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ATTORNEYS FOR DRACO CAPITAL, INC.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE:	§	
	§	
SKYPORT GLOBAL	§	CASE NO. 08-36737-H4-11
COMMUNICATIONS, INC.	§	
	§	
DEBTOR.	§	Chapter 11
	§	
	§	(Expedited Hearing Requested)

EXPEDITED MOTION TO TERMINATE EXCLUSIVITY

DRACO CAPITAL INC. (“Draco”) hereby files this *Expedited Motion to Terminate Exclusivity* (this “Motion”) and respectfully states as follows:

1. Clear Sky Investments, L.P., a Delaware limited partnership (“Clear Sky”) holds 359,724,400 shares of Skycomm Technologies Corporation (“SkyComm”), representing a 48.81 percent interest in Skycomm. Draco, in turn, is a limited partner of Clear Sky. Draco is also an unsecured creditor in this Bankruptcy Case, as the transferee of the claim of Brian Skimmons.

2. Upon information and belief, the exclusivity period expired on July 21, 2009, and therefore, Draco is now free to file a competing plan of reorganization, without prior Court approval. However, this Motion is filed out of an abundance of caution to ensure that Draco does not violate Section 1121 of the Bankruptcy Code.

3. Draco hereby requests that exclusivity be terminated to allow it to file a competing plan of reorganization to that currently proposed by the Debtor. In connection therewith, Draco respectfully submits the following:

PRELIMINARY STATEMENT

4. The Fifth Circuit has recognized the Congressional acknowledgement inherent in the limited exclusivity granted to debtors in Bankruptcy Code § 1121 that “creditors, whose money is invested in the enterprise no less than the debtor’s, have a right to a say in the future of the company.” *United Savs. Assoc. of Texas v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 808 F.2d 363, 372 (5th Cir. 1987). Where, as here, the vast majority of the money invested in the Debtor is the creditors’ money, the creditors should have primary say in the future of the enterprise.

5. Draco is ready to propose a plan that contemplates significant cash payments to the Debtor’s creditors enabling the Debtor to emerge from bankruptcy protection with a greatly delevered balance sheet. Furthermore, on information and belief, significant other creditors of the estate will support termination of the exclusivity period to allow competing plans to be filed and votes solicited from the estate’s constituencies. Draco respectfully submits that an order terminating exclusivity is appropriate and should be entered in this Bankruptcy Case. Draco is ready and willing to propose a confirmable plan that will put this Bankruptcy Case on a path to an expeditious exit that will benefit all creditors and not merely the Debtor’s current Chief Executive Officer, Robert Kubbernus, and Balaton.

Background and Procedural Facts

6. On October 24, 2008 (the “Petition Date”), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor remains in possession of its

property and is managing its business as a debtor in possession pursuant to Bankruptcy Code §§ 1107(a) and 1108.

7. On May 22, 2009, the Debtor filed its proposed plan of reorganization and subsequently amended the same on July 8, 2009. However, in addition to Draco's filed objection, both CenturyTel, Inc. ("CenturyTel") and Aegis Texas Venture Fund, LP ("Aegis") filed objections opposing confirmation of the Debtor's proposed amended plan of reorganization.

8. Finally, on July 30, 2009, the Debtor filed an Emergency Motion to Approve Modifications to Debtor's Chapter 11 Plan, Docket No. 223, Motion to Modify, as a last ditch effort to seek favor with its secured creditors, CenturyTel and Aegis, and to obtain confirmation of its plan of reorganization.

9. The proposed modifications are not "immaterial" as the Debtor would have this Court believe. Instead, they are significant substantive material modifications to the plan that affect all classes of creditors. The plan must be re-solicited. And, if re-solicitation is necessary, because Draco can offer a plan significantly better for the creditors of this estate, this Court should also allow Draco's plan to be offered to the creditors for consideration.

Argument and Authorities

10. Pursuant to Bankruptcy Code § 1121(c), a debtor has the exclusive right to file a plan for the first 120 days of the bankruptcy case. However, on request of a party in interest, the court may reduce or extend the Debtor's period of exclusivity "for cause." 11 U.S.C. § 1121(d). Although "cause" has not been defined, courts have developed factors to be considered in determining whether cause has been shown for a reduction of the exclusivity period:

- (a) the size and complexity of the case;
- (b) the necessity of sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information;

- (c) the existence of good faith progress toward reorganization;
- (d) the fact that the debtor is paying its bills as they become due;
- (e) whether the debtor has demonstrated reasonable prospects for filing a viable plan;
- (f) whether the debtor has made progress in negotiations with its creditors;
- (g) the amount of time which has elapsed in the case;
- (h) whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and
- (i) whether an unresolved contingency exists.

In re Express One Intn'l, Inc., 194 B.R. 98, 101 (Bankr. E.D. Tex. 1996).

11. While these factors are to be considered by the Court, courts have held that the transcendent consideration is whether termination of exclusivity will move the case forward and that this "is a practical call that can override the mere toting up of the factors," *See, In re Adelphia Communications Corp.*, 353 B.R. 578, 590 (Bankr. S.D.N.Y. 2006)(citing and quoting *In re Dow Corning Corp.*, 208 B.R. 661, 670 (Bankr. E.D. Mich. 1997)). This view is consistent with the Fifth Circuit's admonition to bankruptcy courts regarding their consideration of motions to extend exclusivity:

any bankruptcy court involved in an assessment of whether "cause" exists should be mindful of the legislative goal behind § 1121. The bankruptcy court must avoid reinstituting the imbalance between the debtor and its creditors that characterized proceedings under the old Chapter XI. Section 1121 was designed, and should be faithfully interpreted, to limit the delay that makes creditors hostages of Chapter 11 debtors.

Timbers, 808 F.2d at 372; see also *The Official Committee of Unsecured Creditors of Mirant Americas Generation, L.L.C. v. Mirant Corp. (In re Mirant Corp.)*, 2004 WL 2250986, *2 (N.D. Tex. Sept. 30, 2004)(stating that "The bankruptcy court must balance the potential harm to creditors and limit the delay that makes creditors hostages of Chapter 11 debtors.")(citations

omitted); *In re Washington-St. Tammany Elec. Coop.*, 97 B.R. 852, 855 (Bankr. E.D. La. 1989)(quoting *Timbers*, 808 F.2d at 372).

12. Because a termination of the exclusive periods will advance this Bankruptcy Case toward a successful reorganization, this Court should terminate exclusivity.

Application of the Factors Militates in Favor of Terminating Exclusivity

Size and Complexity of the Bankruptcy Case.

13. As noted by the court in *In re Southwest Oil Co. of Jourdan, Inc.*, 84 B.R. 448 (Bankr. W.D. Tex. 1987), “It is clear from the legislative history that congress intended an extension to be granted only in unusual circumstances, involving very large or complex cases.” *Id.* at 452. The Debtor operates a small satellite telecommunications business. The Debtor has two primary secured creditors CenturyTel and Aegis, and a host of unsecured creditors, among whom Draco is one. The Debtor’s business is not sufficiently large or complex (unlike the debtors in the *Dow Corning* and *Adelphia Communications* cases, for example, which involved a significant number of creditors (including multiple tranches of public debt), claimants, and litigation relating to the operations of the businesses) to justify an extension of exclusivity. Thus, this factor weighs in favor of terminating the Debtor’s exclusivity.

Existence of Good Faith Progress Toward Reorganization

14. The Debtor has not shown good faith progress toward reorganization. Rather, the Debtor has proposed a plan that benefits insiders at the expense of its creditors.

15. In addition, the Debtor’s plan does not comply with the Bankruptcy Code or Delaware law. As described in Draco’s prior filings, the most recent plan seeks to strip the equity holders of Clear Sky, a non-party to this Bankruptcy Case, of their investment through the use of the Bankruptcy Code while conducting a merger that fails to meet the legal requirements of Delaware law. Additionally, as established in the objections of Aegis and CenturyTel, the

plan violates numerous provisions of the Bankruptcy Code and is non-confirmable. A confirmable plan of reorganization has not been achieved. Therefore, this factor weighs in favor of terminating the Debtor's exclusivity.

Progress in Negotiations With Creditors

16. The Debtor has not made any significant progress in negotiations with its creditors. As of the filing hereof, the largest of the Debtor's creditors have not voted in favor of the Debtor's proposed plan. In fact, both CenturyTel and Aegis have objected to the Debtor's amended plan. As the Fifth Circuit has pointed out, "§ 1121 represents a congressional acknowledgement that creditors, whose money is invested in the enterprise no less than the debtor's, have a right to a say in the future of that enterprise." *Timbers*, 808 F.2d at 372. Both CenturyTel and Aegis have given their opinion of the Debtor's plan. This factor weighs heavily in favor a termination of exclusivity.

Amount of Time Which Has Elapsed in the Case

17. As discussed above, this Bankruptcy Case is not unusually large or complex. Congress determined that, for most debtors, 120 days would be sufficient time to file a plan and that only in the unusually large and complex cases, would an extension be warranted. *See Timbers*, 808 F.2d at 372 n.15 (quoting H.R.Rep. No. 595, 95th Cong., 2d Sess. 174, 231-32, reprinted in 1978 U.S.C.C.A.N. 5963, 6191, 6192)(footnotes omitted).

18. As noted by the court in *Tony Downs Foods*, "Section 1121 does not create a deadline for filing a plan; the debtor is free to take as much time to develop and file its plan as it feels appropriate. The risk is, of course, that while it is developing its plan, another party in interest will file a plan. However, that is as Congress intended." *In re Tony Downs Foods Co.*, 34 B.R. 405, 408 (Bankr. D. Minn. 1983). Further, as several courts have pointed out when terminating a debtor's exclusivity or denying a debtor's request for an extension of exclusivity,

allowing creditors to file competing plans does not, in any way, affect the Debtor's concurrent right to file a plan. *See, e.g., R.G. Pharmacy*, 374 B.R. at 488 ("The fact that the debtor no longer has the *exclusive* right to file a plan does not affect its concurrent right to file a plan. Denying [the] motion only affords creditors their right to file a plan; there is no negative affect [sic] upon the debtor's coexisting right to file its plan.") (quoting *In re Parker Street Florist & Garden Center, Inc.*, 31 B.R. 206, 207 (Bankr. D. Mass. 1983)).

19. This factor militates in favor of denying the Motion and terminating exclusivity.

Conclusion

20. Application of the factors to the facts of this Bankruptcy Case militates in favor of Draco's request of termination of the Debtor's exclusivity so that it may file a plan that is confirmable and will provide greater return to the estate's creditors, not just the Debtor's insiders. The Debtor's current plan is non-confirmable, and because any amendments to the Debtor's plan must be re-solicited for vote, equity demands that the creditors be given an opportunity to evaluate a plan that will provide them a greater return and not one whose sole benefit is to that of insiders of the estate.

PRAYER

WHEREFORE, Draco respectfully requests that the Court enter an order terminating the Debtor's exclusive right to file a plan and solicit acceptances.

Dated: August 4, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on August 4, 2009, a copy of the foregoing document was served upon all parties via the Court's electronic case filing system (ECF) or by United States First Class Mail, postage prepaid, on all parties on the attached service list.

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